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NO.

IN THE

SUPREME COURT of the UNITED STATES

October Term, 1983

GERALD BANKSTON,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

On Petition for a Writ of Certiorari
to the District Court of Appeal of Florida,
Third District

APPENDIX

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The STATE of FLORIDA, Appellant,

v.

Gerald BANKSTON, Appellee

No. 82-2198

District Court of Appeal of Florida,

Third District.

June 7, 1983.

Rehearing Denied Aug. 15, 1983

Jim Smith, Atty. Gen., and William Thomas, Asst. Atty. Gen., for appellant.

Ginsburg, Nagin, Rosin & Ginsburg and Stephen Rosin, Coral Gables, for appellee.

Before SCHWARTZ, C.J., and BARKDULL and NESBITT, JJ.

SCHWARTZ, Chief Judge.

In our first review of a Miami International Airport narcotics stop and

search since the United States Supreme Court decision in Florida v. Royer, _____U.S._____, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983), affirming, Royer v. State, 389 So.2d 1007 (Fla. 3d DCA 1980) (en banc), rev. denied, 397 So.2d 779 (Fla.1981), we reverse an order of suppression on the authority of that decision.

This particular variation of the generally familiar theme began[1] when two plainclothes narcotics officers, Johnson and Dozier, became interested in Bankston and his companion, Peterson, because they appeared "extremely nervous"[2] in the airport. When

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[1]The facts stated are those in the uncontradicted teistmony of Sgt. Johnson. See State v. Mitchell, 377 So.2d 1006 (Fla. 3d DCA 1979).

[2]No other characteristic of the drug courier profile was noted or relied upon. Both for this reason and because founded suspicion was based upon other non-profile indicia, we do not here reexamine our dictum in Royer, 389 So.2d at 1017, n. 6 that "a conformance, without more [e.o.], to one or more elements of the profile does not amount to articulable suspicion." We do note that the majority of the Supreme Court

they "approached" the appellee, see Florida v. Royer, supra, ____U.S. at____, 103 S.Ct. at 1322, 75 L.Ed.2d at 236; Login v. State, 394 So.2d 183 (Fla. 3d DCA 1981), as he was nearing his departure gate, and asked for his ticket and identification, Bankston voluntarily complied. The names on the two documents did not match. Johnson then asked permission to look inside a suitbag he was carrying. When the defendant asked him what he was after, Johnson stated that he and his partner were narcotics officers, looking for drugs. Bankston at once became faint and asked to sit down. After he was taken to a nearby seating area, the defendant then asked "if I have something, why don't you let me flush it in the john?," to which Johnson

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seems not to have reached or directly addressed that question in Florida v. Royer. But see____ U.S. at____ n.6, 103 S.Ct. at 1339, n. 6, 75 L.Ed.2d at 254, n.6(Rehnquist, J. dissenting).

responded that if all he had was a "head stash, that we would indeed likely allow" him to do so. At that point, Bankston was informed that he was "being detained."

He and Peterson were again asked to consent to a search of their checked and carry-on baggage. Although Peterson agreed, Bankston did not, and Johnson, as he had indicated, went to secure a narcotics dog from its pen on the apron of the airport. When the dog arrived some five-fifteen minutes later, he alerted on the suit bag which had been moved a foot or two away from Bankston to accommodate the sniff. Based on the probable cause which had thus arisen, Florida v. Royer, ____U.S. at____, 103 S.Ct. at 1325, 75 L.Ed.2d at 242; Cavalluzzi v. State, 409 So.2d 1108 (Fla. 3d DCA 1982), the defendant was arrested and a search warrant was secured for the bag. When it was executed, 185 grams of cocaine were found

inside. Bankston's resulting prosecution for trafficking, however, was short-circuited by the order under review, in which the trial judge granted a motion to suppress on the authority of Sizemore v. State, 390 So.2d 40-1 (Fla. 3d DCA 1980), rev. denied, 399 So.2d 1145 (Fla.1981).[3] In the newly generated light of Florida v. Royer, this ruling cannot stand.

We reach this conclusion by the following line of legal analysis:

1. Even putting aside the dubious effect of the observed nervousness, see Royer v. State, 389 So.2d at 1016, n. 4; but see

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[3]In Sizemore, we upheld a dog-sniff of the defendant's hand luggage because, unlike the situation here, the defendant had voluntarily consented to the sniff after being advised of his right to refuse. The pertinence of Sizemore, even pre-Florida v. Royer, is dubious, however, both because (a) none of the circumstances which established founded suspicion in this case were present there and (b) the court specifically found it unnecessary to decide whether Sizemore had even been seized or detained when the consent was given. 390 So.2d at 404.

Florida v. Royer, ____ U.S. at ____, n.5, 103 S.Ct. at 1338, n. 5, 75 L.Ed.2d at 254, n.5 (Rehnquist, J. dissenting), it is clear that Bankston's fainting spell, his dual identification and especially his markedly incriminating statement about flushing "something" down the john[4] were together more than sufficient to engender the founded suspicion of criminal conduct which was required to justify his detention. As stated in the plurality opinion in Royer[5]

> We agree with the State that when the officers discovered that Royer was traveling under an assumed name, this fact, and the facts already known to the officers--paying cash for a one-way ticket,

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[4]Indeed, although we do not so decide, the statement may have been enough to create probable cause.

[5]On this issue, only Justice Brennan is arguably in disagreement. Florida v. Royer, ____ U.S. at ____ _ ____, 103 S.Ct. at 1331, 75 L.Ed.2d at 244-45 (Brennan, J., concurring).

> the mode of checking the two bags, and Royer's appearance and conduct in general--were adequate grounds for suspecting Royer of carrying drugs and for temporarily detaining him and his luggage while they attempted to verify or dispel their suspicions in a manner that did not exceed the limits of an investigative detention. [e.s.]

____U.S. at ____, 103 S.Ct. at 1326, 75 L.Ed 2d at 239. See also Harpold v. State, 389 So.2d 279 (Fla. 3d DCA 1980), rev. denied, 397 So.2d 777 (Fla.1981); Myles v. State, 374 So.2d 83 (Fla. 3d DCA 1979); compare Horvitz v. State, 433 So.2d 545 (Fla. 4th DCA 1983).

2. Having thus properly restrained the defendant, the police then, with astonishing foresight, did just what the Supreme Court later stated they were justified and entitled to do: they held Bankston while awaiting the arrival of a narcotics dog. As the plurality

noted

> The courts are not strangers to the use of trained dogs to detect the presence of controlled substances in luggage. There is no indication here that this means was not feasible and available. If it had been used, Royer and his luggage could have been momentarily detained while this investigative procedure was carried out.

_____U.S. at_____ _ _____, 103 S.Ct. at 1327, 75 L.Ed.2d at 241-42.

> In any event, we hold here that the officers had reasonable suspicion to believe that Royer's luggage contained drugs, and we assume that the use of dogs in the investigation would not have entailed any prolonged detention of either Royer or his luggage which may involve other Fourth Amendment concerns.

* * * * * *

In the case before us, the officers, with founded suspicion, could have detained Royer for the brief period[6] during which Florida authorities at busy airports seem able to carry out the dog-sniffing procedure.[7]

____U.S. at____, n.10, 103 S.Ct. at 1328, n.10, 75 L.Ed.2d at 242, n. 10; compare, Horvitz v. State, supra.

The defendant has suggested that

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[6]The five-fifteen minute time span involved here obviously did not exceed that authorized, in fact actually described, in Florida v. Royer. The question of how long the period of detention may extend and thus whether our holdings in Young v. State, 394 So.2d 525 (Fla. 3d DCA 1981) and State v. Mosier, 392 So.2d 602 (Fla. 3d DCA 1981) may be in jeopardy; are therefore not before us. The issue is, however, now generally before the Court in United States v. Place, 660 F.wd 44 (2d Cir. 1981), cert. granted, 457 U.S. 1104, 102 S.Ct. 2901, 73 L.Ed. 2d 1312 (1982) (invalidating two hour detention of personal luggage to arrange dog sniff).

[7]See note 5, supra.

taking the carry-on bag from Bankston's immediate possession so that the sniff could take place was improper. It is apparent, however, that, since both he and his hand-luggage had already been properly seized, the precise location of either during the period of lawful detention is constitutionally insignificant. Cavalluzzi v. State, supra; see State v. Roberts, 415 So.2d 796 (Fla. 3d DCA 1982); State v. Goodley, 381 So.2d 1180 (Fla. 3d DCA 1980).

Because the conduct of the officers in effecting and conducting the search and seizure of the defendant was in accordance with the extended form of Terry stop approved in Royer, the order of suppression is

Reversed.

IN THE DISTRICT COURT
OF APPEAL OF FLORIDA
THIRD DISTRICT
JULY TERM, A.D. 1983
MONDAY, AUGUST 15, 1983

THE STATE OF FLORIDA **

Appellant, **

vs. ** CASE NO. 82-2198

GERALD BANKSTON **

Appellee. **

**

Upon consideration, appellee's motion for rehearing is hereby denied.

A True Copy

ATTEST:

LOUIS J. SPALLONE

Clerk District Court of
Appeal, Third District

By_____
Deputy Clerk

cc: Stephen V. Rosin
Jim Smith

/srb

IN THE DISTRICT COURT OF APPEAL OF FLORIDA,
THIRD DISTRICT

STATE OF FLORIDA, Appellant, vs. GERALD BANKSTON, Appellee.	CASE NO. 82-9047 MOTION FOR REHEARING OR CLARIFICATION, ALTERNATIVELY FOR REHEARING EN BANC, AND ALTERNATIVELY FOR STAY OF MADATE

Appellee, Gerald Bankston, by and through his undersigned attorneys, pursuant to Fla. R. App. P. 9.330, moves this Court to rehear or clarify its decision in this cause, alternatively, to grant rehearing en banc of its decision herein pursuant to Fla. R. App. P. 9.331, and alternatively for stay of mandate and in support thereof submits:

1. This Court characterized "the generally familiar theme" of facts in this case (in footnotes 1 and 4 of its opinion) as being derived from the "uncontradicted testi-

mony of Sgt. Johnson." In this regard this Court overlooked or failed to consider that all inferences and facts coming to this Court are to be construed in a light most favorable to Appellee. Shapiro v. State, 390 So.2d 344, 346 (Fla. 1980). Detective Johnson's internally conflicting testimony and the affidavit for search warrant introduced into evidence in the lower court clearly show that the alleged statement by Appellee "if I have something, why don't you let me flush it in the john?" did not occur. (T. 48).

Appellee renews its objections made in its Brief of Appellee at pages 4 and 23 to consideration of facts dehors the record in this case, particularly the lack of any record of evidence or testimony regarding the detention of Appellee, and would point out that Detective Johnson testified Appellee's detention was based only upon

observations he made, and not upon the alleged statements about head stash and flushing same. (T. 8).

2. This Court held that "the police then, with astonishing foresight, did just what the Supreme Court later stated they were justified and entitled to do: they held Bankston while awaiting the arrival of a narcotics dog." This Court goes on to cite portions of Florida v. Royer, ____U.S.____, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983) including language therein that "there is no indication here that this means was not feasible..;" "we assume that the use of dogs would not...involve other Fourth Amendment concerns." This Court goes on to hold that the precise location of Bankston and his hand-luggage is "constitutionally insignificant." In reaching this conclusion this Court overlooked or failed to consider the testimony of Detective Johnson that, "We

don't run people with the dog, even suspects for narcotics, only in the fact that the dog would injure people if they would alert to them because it is a very aggressive response." (T. 53). Thus the method by which the dog sniff was conducted and the location of Appellee's luggage cannot humanely be deemed "reasonable" within the ambit of the Fourth Amendment, and must ergo, be constitutionally significant.

4. This Court in reaching the conclusion that the warrantless pre-arrest seizure of Appellee's hand held luggage was "constitutionally insignificant," has also overlooked or failed to consider that all of this Court's prior decisions, relied upon as authority for this conclusion, regarded dog-sniffs of luggage, in which the owners either had abandoned their expectation of privacy either by placing or checking their luggage with various airlines or on carousels, or

consented to the dog sniff. See Cavalluzi v. State, 409 So.2d 1108, 1110 (Fla. 3d DCA 1982); State v. Roberts, 415 So.2d 796 (Fla. 3d DCA 1982); and, State v. Goodley, 381 So.2d 1180 (Fla. 3d DCA 1980). Whereas, the luggage in this case was never turned over to an airline but was in the personal and physical possession of the Appellee, and Appellee never consented to the dog sniff sub judice.

5. The Court has overlooked or failed to consider Florida Statute Section 901.151(5) (1981) which is coextensive with the scope of federal law regulating "Terry-stops," and which limits pre-arrest warrantless seizures to seizures of weapons or evidence found during a pat down for weapons. No weapon was seized sub judice and no pat down conducted.

6. Alternatively, should this court deny rehearing or clarification, Appellee moves for rehearing en banc, pursuant to Fla.

R. App. P. 9.331 undersigned counsel hereby expresses a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the decision of this Court in Sizemore v. State, 390 So.2d 401 (Fla. 3d DCA 1980) and that a consideration by the full Court is necessary to maintain uniformity of decisions in this Court.

7. Only two days ago on June 20, 1983, the United States Supreme Court issued its decision affirming the reversal of conviction in United States v. Place, 660 F.2d 44 (2nd Cir. 1981), aff'd, _____U.S._____(Opinion issued June 20, 1983). In that decision that Court has apparently elaborated its dictum in Florida v. Royer, supra, regarding dog sniffs. Since the luggage in United States v. Place, 660 F.2d at 46, was taken from the physical custody of the defendant rather than from the custody of the airlines, the United States

Supreme Court's decision will most assuredly have a significant impact on this case. Unfortunately, however, undersigned counsel has not been able to obtain a copy of the two day old decision, and would therefore, respectfully request that at the very least this Court stay its decision on this alternative motion for rehearing or rehearing en banc, and stay the issuance of the mandate until Appellee has an opportunity to supplement this motion with reference to this most recent opinion.

WHEREFORE, based upon the foregoing reasons and citations of authority, Appellee requests this Court grant rehearing or clarify its decision, alternatively grant rehearing en banc, or alternatively stay the mandate in this case until the recent decision of the United States Supreme Court may be reviewed and argued.

Respectively submitted,

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By_____
STEPHEN V. ROSIN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed this 22nd day of June, 1983, to the office of Paul Mendelson, Assistant Attorney General, Ruth Bryan Owen Rohde Building, Florida Regional Service Center, 401 N.W. 2nd Avenue, #820, Miami, Florida 33128.

By_____
STEPHEN V. ROSIN

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DADE COUNTY FALL TERM, 1982

CASE NUMBER 82-9047

THE STATE OF FLORIDA

Plaintiff,

vs.

GERALD BANKSTON

Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS

THIS CAUSE having come on to be heard upon the Defendant's Motion to Suppress, the Court having heard argument of counsel and being fully advised in the premises, it is hereby

ORDERED that the Defendant's Motion is granted, for reasons stated in the transcript.

DONE AND ORDERED at Miami, Dade County, Florida, this 1 day of October, 1982.

/s/
JUDGE MURRAY GOLDMAN
CIRCUIT COURT JUDGE
CRIMINAL DIVISION

IN THE DISTRICT COURT OF APPEAL OF FLORIDA

THIRD DISTRICT

CASE NO. 82-9047 [sic]

THE STATE OF FLORIDA,

Appellant,

vs.

GERALD BANKSTON

Appellee.

* *

AN APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA CRIMINAL DIVISION

* *

BRIEF OF APPELLEE [sic]

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II.

THE TRIAL COURT ERRED IN SUPPRESSING THE EVIDENCE IN THE INSTANT CAUSE AS SIZEMORE v. STATE, 390 So.2d 401 (Fla. 3rd DCA 1980) IS INAPPLICABLE TO THE INSTANT CAUSE.

Assuming arguendo that the appellee had proper standing to object, which the appellant vigorously denies he in fact had, the trial court none the less erred in granting the motion to suppress based on its interpetation of Sizemore v. State, supra.

In Sizemore, relied upon by the court in support of its order granting the motion to dismiss, the defendant was not being detained by the police. Indeed, up until the time the dog alerted on Sizemore's suitecase, the defendant would have been free to depart company with the police and continue on his way. Obviously, because there was no detention of the person in Sizemore, nor would any detention have been proper under the facts of the case, the only way police could have gotten

the suitcase from possession of the defendant to the nose of the dog would have been through consent.

Contrary to the facts in Sizemore, the appellee and his suitcase were properly being detained by the police. Further, the court ruled that the detention was proper T-153, and the appellee has not appealed that ruling.

IN THE DISTRICT COURT OF APPEAL OF FLORIDA

THIRD DISTRICT

CASE NO. 82-9047

THE STATE OF FLORIDA,

Appellant,

vs.

GERALD BANKSTON,

Appellee.

AN APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA, CRIMINAL DIVISION.

ANSWER BRIEF OF APPELLEE

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hypothesizing proper detention, assuming it arguendo, presuming it for the sake of proceeding with a legal argument regarding what police may or may not do once they have acquired a right to detain a citizen. (T. 152-156). No construction of lines 14 through 18, (T. 153), could lead one to conclude the trial court was making a ruling at that time on the right of the police to detain Appellee. Moreover, Appellee respectfully objects to all citations to "R. 29-36" by Appellant for "facts" not testified to at the hearings transcribed for the instant Record on Appeal. (Brief of Appellee [sic] at 2-7). It is Appellant's burden to provide a complete record. Dade County Board of Public Instruction v. Foster, 307 So.2d 502 (Fla. 3d DCA 1975). Appellant has omitted any transcripts, if any exist, of evidence or testimony regarding the detention of Appellee. It is improper for Appellant to

attempt to ameliorate this fatal omission by citations to nonevidentiary pleadings. This is clearly illustrated by the testimony of Detective Johnson who claimed Appellee's detention was based only upon observations he made, (T. 8), and not, as Appellant claims, upon Appellee's alleged statements about head stash and flushing same. (Brief of Appellee [sic] at 5).

Appellant has compounded its improper citations to the Record on Appeal by adding and even underlining the words "the companion's" to the verbiage otherwise extracted verbatim from (R. 31), which actually reads: "The officer then requested to look inside the gray carry-on suitbag that defendant had in his possession." (R. 31), and (Brief of Appellee [sic] at 4, ¶ 2).

were properly being detained by the police." (Brief of Appellee [sic] at 11). For this factual statement Appellant cites to "T-153." (Brief of Appellee [sic] at 11). Appellee maintains that neither that nor any other portion of the Record on Appeal supports Appellant's factual assertion.

A thorough review of the context which is covered by that and subsequent pages of the Record reveals that at no time does the trial court make a factual finding or legal determination that the Appellee and his hand held suit bag were legally detained. (T. 152-156). Instead what such a review of the Record reveals is that the trial court, in an attempt to accomodate the prosecutor in his legal argument, assumed arguendo that the police had the right to detain Appellee. (T. 152-156). The trial court never actually determined that the police legally stopped Appellee or had the right to do so.

Even assuming arguendo that the trial court made a factual finding and legal determination that the police had the right to detain Appellee, there is not even a scintilla of evidence in the Record to support such a conclusion. As noted earlier, it is Appellant's responsibility to provide a complete record. Dade County Board of Public Instruction v. Foster, 307 So.2d, at 502. Appellant at best merely cites to the alleged conclusion of the trial court, but Appellant cites to no evidence in the Record that even establishes why Appellee was detained,

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[14]Appellant again complains that "[A]ppellee has not appealed that ruling." (Brief of Appellee [sic] at 11). See, p. 7, supra.

NO.

IN THE

SUPREME COURT of the UNITED STATES

October Term, 1980

THE STATE OF FLORIDA,

Petitioner,

vs.

MARK ROYER,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

BRIEF OF PETITIONER ON JURISDICTION

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was granted; extensive briefs of the parties were submitted and oral argument was subsequently heard on April 14, 1980. On September 9, 1980, in a split opinion, the District Court reversed the panel opinion and the trial court.

The en banc decision herein is identical in its structure to the dissent to the panel opinion and is authored by the dissent to the panel opinion. Indeed, the facts relied upon by the en banc court are no different than those stated above. except that the en banc court infers (on a defense appeal) from the barren record that the Defendant's ticket and license were not returned. Id at 1018. Such a factual finding and question was never presented to the trial court. This also of course, also ignores any issue of articulable suspicion to conduct a brief investigation. The fundamental position of the en banc court was simply a reweighing and different view of the facts.

The fundamental error in the en banc court reversal herein is reflected in its view of the factual question of consent found by the trial court and affirmed by the panel opinion. The en banc court opinion refers to the factual finding of consent by the trial court as THE "ALLEGED CONSENT." Id at 1019. Citing Frost, infra, the District Court's en banc opinion then takes the view that any movement from the airport concourse to the room forty (40) feet away under Dunaway was an arrest. Id 1018-1019. The Court ignores any possibility of a brief detention of the Respondent for investigation by stating that the alias used by the Defendant was not a suspicious circumstance in the experience of the Court[2]. 389 So.2d at

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2. The District Court's en banc decision and outright rejection of Johnson's experience and factual observations is absolutely refuted by the record. THE DEFENDANT WAS NERVOUS ABOUT SIXTY-FIVE (65) POUNDS OF MARIJUANA!! He was travelling under an alias to avoid detection!

United States v. Mendenhall, __U.S.___, 100 S.Ct. 1870 (1980) is contra. 389 So. 2d 1019 and 1017 n. 6. The Court concluded without viewing the facts reached by the trial court as sustained by the panel, that because the Respondent was illegally detained, his consent was therefore, automatically invalid. Id at 1018. The Court stated that there was no precedent to sustain the trial court. But see, e.g., United States v. Mendenhall, supra. On September 24, 1980, the State filed its Motion for Rehearing and Motion for Certification noting the grevious error in the en banc decision. On October 21, 1980, the State's Motion for Rehearing was denied. On March 18, 1981, the Florida Supreme Court with Justices Alderman and Adkins dissenting, denied the State's application for review of the Florida District Court's en banc decision. Al.